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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 800

RUFO C. ROMERO,

Petitioner,

vs.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNEIL ISLAND, WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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RUFO C. ROMERO, PETITIONER

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P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNEIL ISLAND, WASHINGTON, RESPONDENT

SUPPLEMENTAL MATTER TO BE MADE PART OF PETITION AND BRIEF

During the pendency in the lower court and before the printing and filing of the above-entitled petition for writ of certiorari, it appeared that the matter herein submitted would not have been a proper question involved, but in view of the recent decision of this Court in *Viereck* v. *United States*, decided March 1, 1943, it now seems that it is pertinent and important to the consideration of this cause. The matter is a portion of the closing remarks by counsel for the prosecution addressed to the Members of the Court Martial (Court-martial record, p. 635), and is as follows:

> * * * this accused is guilty of one of the most reprehensible acts that could be charged against an officer. Not once in a lifetime does such an act come to our attention, and to avoid a repetition or recurrence, it is necessary to deal harshly with offenders of this type. The accused is guilty of more than is alleged in the specifications, for he has violated the feelings of every officer and every individual who regards a position of trust as a sacred responsibility. Such a man is a menace to his native country and to the United States, for, had he accomplished the design which was intended, the results might well have been catastrophic. If he is capable of one such attempt, he is capable of others, and if we are to safeguard our military secrets, our lives, our families, and our rights as liberty-loving individuals, we must take steps to care adequately for a man who will sell his country. * * *

Petitioner submits that these remarks were highly prejudicial to his right to a fair trial. These remarks were entirely inconsistent and immaterial to the specifications, evidence, or issues in the case. They were merely designed to arouse passion and prejudice, and to stir a person's rage and fear.

Respectfully submitted.

PEDRO P. SEMSEM,
Attorney for Petitioner.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered January 29, 1943, affirming the judgment of the District Court of the United States for the Western District of Washington rendered June 12, 1942.

Opinion Below.

The opinion of the court below filed and rendered January 29, 1943, is not yet reported, and is printed in the Transcript of Record, pages 192-203.

Basis of Jurisdiction.

Jurisdiction is invoked under Title 28, United States Code Annotated, sections 347 (a), 451, and 452.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed January 29, 1943, and a final judgment was entered on the same date.

Statement of the Case.

This is a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Western District of Washington. In the district court petitioner filed a petition for a writ of habeas corpus whereby he submitted that he was unjustly and unlawfully imprisoned by color of authority of the United States, in custody of the respondent, and that the cause or pretext of such detention and imprisonment was a certain order of commitment by a general court martial held and convened at Fort William McKinley, Philippine Islands, on November 25, 1940, ordering that petitioner be imprisoned for a period of 15 years; that said restraint and detention are illegal and in violation of Articles IV, V, and VI of the Amendments to the Constitution of the United States; in violation of the Act of June 4, 1920 (chap. 227, subchap. II, articles 17, 35, 70; 41 Stat. 790, 794, 802), and is contrary to law.

Petitioner was a captain in the United States Army in the Philippines. He was a Topographical Officer and also an Intelligence Officer (R. 166)*. He was charged with violation of the 96th Article of War, with four specifications of conspiracy to unlawfully communicate and reproduce certain maps. The maps and other evidence were not made a part of the record transmitted to the office of the Judge Advocate General.

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* "R." refers to transcript of record, and not to court-martial record.

The maps were old maneuver maps of several years ago, obsolete, out of date, and some of them were of the kind usually used as wrapping and sketching paper at the engineer headquarters (R. 161, 162). The maps seized from the locked trunk of petitioner's car were to be delivered to the headquarters in Manila for destruction. The petitioner's house where he was searched and arrested was situated outside of the military reservation.

One Major J. K. Evans, chief of intelligence, Philippine Department, United States Army, detailed one Anis Gepte of the Philippine Constabulary who, in turn, employed the services of two individuals (made co-conspirators in the case) and solicited and induced petitioner to show them the maps. Major Evans himself testified that he told Anis Gepte what maps to ask for (R. 150). It was at Major Evans' instigation, through prosecution's principal witness, Anis Gepte, that the maps were allegedly shown (R. 147).

Major Evans made arrangements with officers of the Philippine Constabulary who are possessed of police authority, to secure a search warrant and issued on his behalf (R. 148). The warrant was issued by the justice of the peace of the municipality of Pasay, Province of Rizal, P. I. (a copy appears in R. 185), directed to any police officer to search the residence of petitioner for stolen maps belonging to the United States Army, and if such were found to bring it forthwith before him in the justice of the peace court of Pasay, Rizal. Major Evans had no warrant from any source (R. 151).

When all was in readiness according to his instructions, Major Evans, in company of the police officers armed with the search warrant raided the petitioner's house. He was the first one to enter, without knocking at the door. Finding nobody in the hall he kicked the bedroom door wherein he told petitioner to stay at one side of the room. He searched the house and took possession of everything that might be

used against petitioner. The photographic negatives were not covered by the warrant. He also arrested petitioner and took him into custody to Fort William McKinley, together with all the articles he seized. The police officers took or seized nothing from petitioner's house. (R. 148-150.)

During the preliminary investigation, petitioner retained one Major Lynch, a retired Army officer and an outstanding attorney, to be his chief defense counsel, but the investigating authorities denied the presence of this counsel. Then petitioner requested that one Major Poblete, a Filipino U. S. Army officer and a very capable lawyer, to represent him. This was also denied by the Army authorities. (R. 30; Appendix A.)

At the beginning of the court martial trial, the commanding general appointed two officers to act as defense counsel. Petitioner also engaged a civilian counsel who was a member of the Philippine bar. But at the early stage of the trial and when the maps were to be testified to and introduced in evidence, the court excluded this civilian counsel from the court room (R. 128-29).

Specification of Errors to Be Urged.

1. The lower court erred in holding that it did not constitute unreasonable search when a police court search warrant issued by a justice of the peace of a municipality in the Philippine Islands was used as the basis of Federal search and prosecution.

2. The lower court erred in holding that petitioner was not denied the right to be represented by counsel, especially of his own selection, when in fact he was denied such assistance in the preliminary hearings; and his civilian counsel was excluded from the court room during certain stages of the court martial proceedings.

3. The lower court erred in holding that under the Constitution of the United States petitioner is not entitled to the right of counsel in the preliminary investigation; that under the 70th Article of War petitioner is not entitled to the assistance of counsel in such preliminary hearings.

4. The lower court erred in holding that the subject of inquiry in habeas corpus proceedings is confined to the question of jurisdiction, notwithstanding the fact that the judgment being reviewed is a court martial judgment.

5. The lower court erred in not reversing the district court judgment and in not releasing petitioner from imprisonment when it found and held that the court martial violated the statute under which it was created, namely, the Act of June 4, 1920 (41 Stat. 794), and Articles of War 35 and 50½.

Summary of Argument.

I. Petitioner's constitutional right against unreasonable search and seizure was violated when a police court search warrant was used as the basis of the Federal search and prosecution. The circumstances under which the warrant was issued and the acts and behavior of Major Evans during the raid is such that in effect he executed the search warrant issued by the justice of the peace.

II. (a) Petitioner was not given effective aid and representation of counsel within the meaning of the Sixth Amendment. He was not given a fair and impartial hearing during the preliminary investigation.

(b) Petitioner was not given a preliminary hearing consistent with the due process clause of the Fifth Amendment.

(c) Exclusion from the court room of any of petitioner's counsel was a clear invasion of his constitutional right; whenever the relation of client and attorney existed peti-

tioner had the guaranteed right of having all his counsel represent him in any, all, and every stage of his case, notwithstanding the fact that the other counsel who remained were able to take care of his interests.

III. A court martial is a court of limited jurisdiction, and its judgment can be attacked collaterally. The judgment can be reviewed by civil courts in habeas corpus proceedings. In order to be valid and to give effect to its judgment, it must be affirmatively and unequivocally shown that the court martial had (1) jurisdiction, (2) that it complied with the statute under which it was created, (3) that its judgment is conformable to law. It was proper for the lower court to inquire whether the judgment of the court martial was conformable to law.

IV. Absence of any of the indispensable requirements to the validity of a court martial decision renders the judgment void, for it was rendered without authority of law. Petitioner, being restrained of his freedom under a void judgment, is, therefore, entitled to his liberty.

Argument.

I. Petitioner's constitutional right against unreasonable search and seizure was violated when the police warrant was used as the basis of the Federal search and prosecution. Major Evans indirectly did what he was prohibited from doing directly. The nature of the search and seizure can best be illustrated by quoting Major Evans' testimony (R. 148-150), as follows:

> I made arrangements for search warrants and raiding parties in connection with the residence of the accused and the residence of the co-accused, Cabrera.
>
> The arrangements were made with the Chief of the Information Division of the Constabulary, who detailed his assistant, Captain Gabriel, to work with me. When

I was informed that all was in readiness and that the reproductions were in the process of being made, the raiding party started out and raided the two places simultaneously. After surrounding the house at 100 Calle Del Pan, the residence of the accused, I entered the front door, which was merely a screen door and was not fastened shut, and had proceeded about half way across the sala (hall) without seeing anyone, when the door to a bedroom in the back of the house opened and the co-accused, Cabrera, looked out. When he saw me he ducked back in the door and closed the door. I ran the remaining distance and kicked the door open before it had fully closed, and found the accused, the co-accused, Cabrera, and the wife of the accused in the room, and an individual whom I did not identify at the time, had just ducked a side door. The accused, his wife and Cabrera had started after him, but I stopped them and required them to go to the opposite side of the room. There was a wire coat hanger hanging on a light fixture in the middle of the room and to it were attached several photographic negatives, apparently drying, for when I touched one it was still damp. At another place in the room there were still more negatives, all of them reproductions of secret maps of the United States Army pertaining to the national defense. In the room also were found several rolls of documents, which proved to be classified maps and overlays. In the basement of the house was a dark room which gave every evidence of having been recently used. A light was still burning inside the room and the equipment was in such disarrangement as to indicate recent use. Obtaining the keys to the accused's automobile, I opened the trunk of the car and found another large roll of classified documents belonging to the United States Army. The accused was taken into custody. * * * I took possession of all the classified documents found, so as to prevent them being seen by other members of the raiding party which, by the way, included a sergeant of the Military Police, United States Army, also, and I took the documents, the photographic negatives and the accused to Fort McKinley.

The police warrant specified only "stolen maps" and required that they be brought before the justice of the peace court. The photographic negatives were not even covered by the warrant.

Even a mere casual glance of the testimony of Major Evans would not indicate that he accompanied the police as a mere spectator to identify the maps, as inferred by the lower court. The warrant was issued upon his request. The raid was under his supervision and he was the first to enter the house and used force in leading the search. Even stolen papers or property (maps in question here were not stolen) have to be searched and recovered in a lawful manner—that is, with a search warrant lawfully applied for, issued, and executed (*Gouled* v. *United States,* 255 U. S. at p. 308).

The stipulation between counsel referred to (R. 156) did not validate the Federal search so far as this case is concerned. That was merely a stipulation of the existence of a police warrant issued out of the justice of the peace procured and possessed by the Constabulary. It was not a stipulation that Major Evans had authority to enter and search petitioner's premises, nor was it stipulated that he was competent to execute a warrant issued by a civil court in the Philippines. Furthermore, petitioner has the constitutional right to be safeguarded against unlawful search and seizure, and counsel cannot make stipulations which operate as a surrender of his substantial rights (*Ball* v. *Bank of State,* 8 Ala. 590, 42 Am. Dec. 649; *Wabash, St. L. & P. R. Co.* v. *McDougall,* 18 N. E. 291). Stipulations by counsel as to matter of law have also been held to be of no effect (*New Jersey Title Guarantee & T. Co.* v. *McGrath,* 224 Fed. at p. 759). Nor could counsel bind his client by admission or stipulation prejudicial to the client's cause of action or defense (2 R. C. L. 990).

The admission of the maps into evidence was objected to by defense counsel (R. 153), and also by petitioner him-

self (R. 177) in this term: "* * * I believe, therefore, that these maps should be rejected as evidence, because Major Evans has no authority to execute a search warrant issued by civil courts in the Philippine Islands."

If it could be stated that the objection was not timely as prescribed by the rules of evidence, and while this is a rule of great importance, yet, after all, it is only a rule of procedure, it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. Where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it was the duty of the court martial to entertain an objection to their admission or a motion for their exclusion. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. To admit evidence unconstitutionally seized would be compelling an accused to become an unwilling witness against himself, which is prohibited by the Fifth Amendment. (*Gouled* v. *United States,* 225 U. S. 312-313.)

Various Federal courts, and principally this Court, have definitely established the principle that a State or police warrant when executed by Federal officers, may not be used as a basis of a Federal search and prosecution. That would be a violation of an accused's constitutional right against unreasonable search and seizure guaranteed him under the Fourth Amendment. (*Garske* v. *United States,* 1 F. (2d) 620; *United States* v. *Constanzo,* 13 F. (2d) 259; *Mann* v. *Commonwealth,* 279 S. W. 1079; *United States* v. *Spallino,* 21 F. (2d) 567; *Byars* v. *United States,* 273 U. S. 28.)

In the above case of *Byars* v. *United States, supra,* the warrant to search described premises was in the hands of local police officers and accompanied by a Federal agent. The Federal agent had no warrant nor authority to enter the premises. The search and seizure was made entirely upon the authority of the police warrant. The Federal

officer found some unlawful stamps and kept them together with those found by the other members of the raiding party. In this instance this Court stated that:

> Whether the warrant was good under the local laws is not necessary to inquire, since in no event could it constitute the basis for a Federal search and seizure. Nor was it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system that evidence of crime discovered by a federal officer in making a search without a lawful warrant may be used against the victim of the unlawful search. * * * While it is true that the mere participation in a state search by one who is a Federal officer does not render it a Federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect, and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of persons and property are to be liberally construed, and it is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. * * * The participation of the Federal officer was under color of his Federal office and the search in substance and effect was the joint operation of the local and Federal officers. In that view, so far as the inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own.

II. Petitioner was not given effective aid and assistance of counsel within the meaning of the Sixth Amendment. Shortly before the investigation of the charges petitioner engaged a prominent attorney named Mr. Lynch to be his chief defense counsel. But this counsel was not permitted to be present during the preliminary hearing. Then pe-

titioner tried to retain Major Poblete, a Filipino U. S. Army officer and a capable lawyer, to be his chief defense counsel. But this was also refused by the Army authorities. Throughout the preliminary hearings petitioner was not represented by counsel (R. 30). He was not even confronted by two witnesses whose depositions had been used to support the recommendation for the charges, though they lived only about 8 miles from the place and could easily have been procured. Likewise, no counsel represented him and prepared his defense from the day of his arrest to the day of his trial. The day before the court martial trial petitioner was told that two Army officers were appointed to be his defense counsel.

The lower court does not regard the preliminary investigation as "a criminal prosecution" for which the Sixth Amendment provides for a counsel. Petitioner submits this is error. The preliminary investigation and the period preceding the trial is the most critical period of the proceedings against petitioner, that is to say, from the time of his arrest until the beginning of the trial, when consultation, thoroughgoing investigation, and preparation were vitally important. He was as much entitled to the assistance of counsel during that period as at the trial itself. (*Powell* v. *Alabama*, 287 U. S. at 57.) This will also involve the Fifth Amendment, for the right of petitioner to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the due process clause. It never has been doubted by this Court, or any other court so far as is known, that a preliminary hearing is a preliminary step essential to the passing of an enforceable judgment, and that it, together with a legally competent tribunal having jurisdiction of the case, constitute the basic elements of the constitutional re-

quirement of due process of law. (*Powell* v. *Alabama*, 287 U. S. 45.)

In *Powell* v. *Alabama*, supra, the defendants were represented by counsel appointed by the court during the preliminary hearings. But no counsel prepared the case for the defense in the period between the preliminary hearing and the day of trial. And when the trial started two lawyers agreed to participate for the defense. This Court ruled that the defendants were not given effective aid so as to make it a fair trial, and that they were not represented by counsel within the meaning of the Sixth Amendment to the Constitution.

While it is true that the 70th Article of War does not literally specify the right of counsel to a person under investigation it is equally true that this same article requires that there must be a fair and impartial investigation. By direction of the President the War Department, under date of December 29, 1938, issued Circular No. 79, for the purpose of giving persons fair and impartial investigation, which provides: "No charge shall be recommended for trial by general court martial unless, prior to such action, the thorough and impartial investigation required by Article of War 70 shall have been made." * * * "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made."

The assistance of counsel is essential to a fair hearing, and the accused is to be allowed the presence and advice in the preliminary investigation. If an accused was denied counsel in the preliminary hearing, he was not accorded the fair and impartial hearing guaranteed to all persons whose liberty is involved (Ex parte *Lam Pui*, 217 Fed. 456). In order to afford an accused a hearing consistent with the due process clause of the Fifth Amendment, the govern-

ment must allow him a fair opportunity and the right to secure counsel of his choice. (11 Am. Juris. 1107; Ex parte *Chin Loy You,* 223 Fed. 833.)

Petitioner submits that he was not given the right to be represented by counsel of his own selection—the ones he really wanted to be chief defense counsel. The two Army officers, neither of them were lawyers, who acted as defense counsel, were appointed by the Army authorities. They were not his choice. They were the choice of the Army authorities. His choice whom he desired as chief defense counsel were denied to him. Since one counsel had to act as a chief defense counsel the court asked whom he desired to act as such among the two appointed Army officers and a civilian counsel who was recognized as one of the defense counsel. Thereby petitioner had to nominate the principal counsel and assistants. (As to the faith of these appointed officers as defense counsel see Appendix A.) He had to request the withdrawal of one of these officers when the officer's antipathy became so apparent, particularly when petitioner requested that certain Filipinos be called as witnesses, the officer flavored his unwillingness by remarking: "Who would believe a Filipino?"

Article of War 17 provides that the accused shall have the right to be represented before the court by counsel of his own selection, "civil if he so provides" or "military if such counsel be reasonably available," otherwise by the defense counsel duly appointed for the court. Then it goes further, "Should the accused have counsel of his own selection, the defense counsel, if any, of the court, shall if the accused so desires, act as his associate counsel." Confining the argument to this particular point of Article of War 17, it seems that the article intended to make the civilian counsel as chief defense counsel and imposed a limitation to the appointed officers in a capacity as associate counsel. The civilian counsel was not appointed by or for

the court. He was procured by petitioner himself, though as a whole, he was only petitioner's third choice, the first two choices, Mr. Lynch and Major Poblete, having been refused; it seems then, so far as Article 17 is concerned, the civilian counsel became petitioner's choice and to act as principal counsel, and the appointed officers *shall* act as associate counsel. The appointed officer who acted as chief defense counsel was disqualified by reason of the fact that a civilian counsel was selected by petitioner.

At certain stages of the proceedings especially when the maps were to be testified to and introduced in evidence, the court martial excluded this civilian counsel from the court room. On account of the antagonistic attitude of the court which led to the conclusion that he could not effectively assist petitioner, the civilian counsel was forced to withdraw (see Appendix A). Petitioner had not consented to this exclusion, and his mere silence did not operate as a waiver in view of subsection (c), page 137, Manual for Courts Martial, which provides: "* * * a waiver of an objection does not operate as a consent where consent is required, and a mere failure to object does not amount to a waiver * * *."

Petitioner has the constitutional guarantee of representation by counsel at any, every, and all the stages of the proceedings. When the court martial recognized the civilian counsel, he thereby became an officer of that court—a part of that court. When he was excluded the court became incomplete and was no longer a court of competent jurisdiction. (*Johnson* v. *Zerbst,* 304 U. S. 458.) An accused has the right to have all his counsel represent him during his entire trial, and it is reversible error to exclude them, or any of them, from the court room at any stage of the trial (Cooley's Constitutional Limitations, p. 703). Exclusion from the court room of any of his counsel is a clear invasion of his constitutional right notwithstanding

the other counsel who remain are capable of taking his interests (*Jackson* v. *State,* 115 S. W. 262).

In *Johnson* v. *Zerbst, supra,* decided May 23, 1938, this Court laid down the principle, as follows:

> A person charged with crime is entitled by the Sixth Amendment to the Constitution to the assistance of counsel for his defense. The right may be waived, but the waiver must be an intelligent one, and whether there was such must depend upon the circumstances and particular facts, including background and conduct of the accused. If the accused is not represented by counsel and has not waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. The Sixth Amendment withholds from Federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.
>
> True, habeas corpus can not be used as a means of reviewing errors of law and irregularities—not involving question of jurisdiction—occurring during the course of the trial; and the writ of habeas corpus cannot be used as a writ of error. These principles, however, must be construed and applied so as to preserve —not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. Congress has expanded the right of a petitioner for habeas corpus. Since the Sixth Amendment constitutionally entitles one charged with a crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty. A court's jurisdiction at the beginning of the trial may be lost "in the course of the proceedings" due to failure to complete the court as the Sixth Amendment requires. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdic-

> tion to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

It necessarily follows that the principle laid down by this above authoritative decision is true with the other amendments to the Constitution. In the case at bar, when petitioner's right against unreasonable search and seizure guaranteed by the Fourth Amendment was violated the court martial lost its jurisdiction. So, also, when petitioner was denied the assistance of counsel during the preliminary hearings and no counsel prepared his defense during the period preceding the day of trial, the due process clause of the Fifth Amendment was violated, there and then the court martial lost its jurisdiction to proceed.

III. One of the indispensable requirements to the validity of a court martial judgment is that it must be conformable to the law. The lower court erred in not inquiring whether this particular requirement was complied with. If it could be stated that the lower court is powerless to interfere with the error committed by court martial due to its failure to make the proper inferences from the evidence, there enters the question, however, which is the duty of the lower court, and within its power to decide, is whether the conviction of petitioner having been procured by entrapment and this type of conviction being held void, contravenes the due process clause of the Fifth Amendment.

In the present case, it clearly appears that petitioner was induced or led to commit the act charged by active cooperation and instigation of public officers. The act complained of was accomplished at the direct solicitation of Major Evans and his agent, Anis Gepte. The alleged coconspirators, Agbay and Cabrera, and government agent agreed among themselves to frame-up petitioner. The witness, Agbay, testified that he was solicited and offered

reward by the government agent to frame-up Captain Romero (R. 167), as shown in the following testimony:

> Question: Did you receive any offer of reward or pay?
> Answer: Yes, sir.
> Question: What was offered you?
> Answer: Cash was the offer, and promise of a position as secret service or agent of the Philippine Constabulary, in case we will be successful in the case he is after.
> Question: What case was that?
> Answer: The case—the frame-up case that he proposed to me.
> Question: And who was the party to be framed?
> Answer: Captain Romero.

The witness Cabrera testified to the same effect (R. 171-172). The government's principal witness, Gepte, testified that it was at Major Evans' direction and instigation that the maps were solicited and shown to him. Major Evans testified that he told his agent, Gepte, what maps to ask and be shown (R. 150). On cross-examination Major Evans testified:

> Q. Why did you give Gepte a list of maps that you desired him to obtain?
> A. I am unaware of having testified of having given him a list of maps.
> Q. The witness Gepte has testified among other things that you told him to obtain the plan of the defense of Bataan or the Philippines, I cannot recall which.
> A. I myself testified that I told him what to ask, that is not giving him a list. I make no list and gave him no list. During direct examination because the court was in open session I did not state in detail what I indicated that Gepte should ask for. I actually indicated that he should request maps in general showing dispositions on Corregidor and Bataan, the entrance to Manila Bay and the Department War Plan. * * *

It is reasonably clear that the Government officer and his agent were not engaged in detecting crime, but they created the act and procured its commission. This type of procedure and practice by public officers is denounced by the courts as scandalous and against public policy. This practice cannot be tolerated and conviction of crime or offenses so procured cannot stand. (*United States* v. *Healey,* 202 F. 349; *United States* v. *Adams,* 59 F. 674; *Dalton* v. *State,* 39 S. E. 468.) In the case of *United States* v. *Healey, supra,* the court substantially said:

> Decoys are permissible to entrap criminals, or to present opportunity to those having intent or who are willing to commit crime, but not to create criminals, or to ensnare the law-abiding into committing an offense without intent to do so. One is relieved of the obligation by the government's invitation, which is in the nature of fraudulent concealment and deceit, and if not consent, yet does work an estoppel. If the accused violated a statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted. That the accused is suspected of any violation of law, does not justify instigating and entrapping; for thereby a law-abiding person may as easily be ensnared. This practice cannot be tolerated and conviction of offense so procured cannot stand.

In *United States* v. *Adams, supra,* the court stated the principle that courts will not lend aid or encouragement to government officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime in order that they may arrest and have them punished for so doing. The encouragement to persons or criminals to induce them to commit crime in order to get a prosecution against them is scandalous and reprehensible.

The contents of the maps was not understood by the witness and co-conspirators. The agent, Gepte, could not

identify the contents, nor the maps he alleged he saw. In order to exist a communication, there must be an understanding and meetings of the minds.

When Gepte contacted petitioner the pretense was that a certain sultan of Mindanao (no such person in existence) desired to buy some maps. Since the supposed buyer was but a mere imaginary person, a mythical sultan, no crime could have been committed, nor an intent to commit a crime imputed to petitioner. Furthermore, the undertaking was a part of petitioner's official duties by reason of his capacity as an Intelligence Officer.

IV. The lower court correctly held that when the court martial did not include the maps and other evidence introduced at the trial, with the record transmitted to the Review Board of the Judge Advocate General's office, that was error and in violation of the Act of June 4, 1920 (41 Stat. 794), and Articles of War 35 and 50½.

But on this basis alone the judgment of the district court should have been reversed. The court martial failed to comply with the statute under which it was created. While the violation of the statute nullified the judgment and a gross prejudice in itself, petitioner deems it proper to answer the lower court's assertion that petitioner has shown no prejudice in this error. Was he not prejudiced when he was deprived of his right under the statute to have the maps exhibited and examined by the Review Board? Was he not prejudiced when he was convicted by a judgment improperly and unlawfully approved by the Review Board? The Attorney General of the United States, in his interpretation of Article of War 35 (3 *Op. Atty. Gen.* 545), stated:

> It is not sufficient to return the inference or conclusions of the court-martial nor mere statements of the evidence inspected; but the evidence itself on which they based judgment must be returned. It is improper

> for the reviewing authority to make any decision in regard to the effect of a certain act of Congress, in cases where the Record is so defective. The Record would not exhibit the facts of the case in such form as would have authorized the review board to pass upon them. As no sentence of a general court-martial can, pursuant to the act of Congress of June 4, 1920, article of war 50½, be carried into execution until it is approved by the review board for transmission to the President for confirmation, it is essential that the Record should contain all the evidence; and that, in order to a confirmation such evidence should sustain the finding of the court. It would not be proper for the reviewing authority to make any decision in regard to the effect of the act of Congress of June 4, 1920, when the Record is defective in presenting, in the usual and legal form, the facts on which the correctness of such decision must depend.

Authority of a court martial is derived from the statute, and it must proceed in conformity therewith. Being an inferior court of limited jurisdiction, its judgment may be attacked collaterally, and the validity of its proceedings can be revised upon a hearing in habeas corpus. (*McClaughry* v. *Deming,* 186 U. S. 49; *Runkle* v. *United States,* 122 U. S. 543.) In *Dynes* v. *Hoover,* 61 U. S. at p. 81, this Court said: "Persons belonging to the Army and Navy are not subject to irresponsible courts martial, when the law for convening them and directing their proceedings or organization and for trial have been disregarded. In such cases everything which may be done is void—not voidable; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or judgment. In *McClaughry* v. *Deming, supra,* this Court definitely stated that to give effect to its sentence, it must appear affirmatively and unequivocally that the court martial was legally constituted, that it had jurisdiction, that all the statutory

regulations governing its proceedings had been complied with, and that its sentence was conformable to law. The absence of any of these indispensable conditions renders the judgment of a court martial *coram non judice*, and absolutely void, because such judgment and sentence is rendered without authority of law and without jurisdiction.

Conclusion.

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be reversed, and a writ of habeas corpus be issued by this Honorable Court directed to the respondent warden, United States Penitentiary, McNeil Island, Washington, and that petitioner be ordered discharged from detention and imprisonment thereat. And for such other and further relief as to the Justices of this Court may appear and seem just and proper.

Respectfully submitted,

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